

WILLIAM B. EDDY)	
Claimant)	
VS.)	
)	Docket No. 1,018,744
CENTRAL PLASTICS, INC.)	
Respondent)	
AND)	
)	
NATIONWIDE MUTUAL INSURANCE CO.)	
Insurance Carrier)	

Claimant contends Judge Moore erred. Claimant argues he injured his back at work and that he provided respondent with timely notice of the accidental injury. Regardless of the date of accident, claimant argues he provided respondent with timely notice that he injured his low back at work. Accordingly, claimant requests the Board to grant him benefits for his low back.

Conversely, respondent and its insurance carrier request the Board to affirm the December 21, 2004 Preliminary Hearing Order.

The issues before the Board on appeal are:

1. Did claimant prove he injured his low back due to an accident he sustained while working for respondent?
2. If so, did claimant provide respondent with timely notice of the accidental injury as required by K.S.A. 44-520?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes:

As indicated below, claimant's testimony regarding when and how his low back symptoms began is vastly inconsistent and, as a result, fails to carry his burden of proof. Accordingly, claimant has failed to prove he either injured or aggravated his low back working for respondent.

In an August 5, 2004 telephone interview with Ms. Theresa Thomssen, claimant stated he irritated his back, about a month and a half before the date of their conversation, while carrying boxes of material from the line to the rack.¹ Claimant also told Ms. Thomssen that he went to the doctor the following day. In that interview, claimant also told Ms. Thomssen that he had injured his back working for respondent in April 2002 (which was later determined to be in 2001) and that he had experienced ongoing back soreness since 2002. Claimant stated, in part:

Q. (Ms. Thomssen) So between August of 2002 and April in 2004 have you seen a doctor for your back?

A. (Claimant) No, I, I just thought it was just thought it was getting old when I'm, as soon as I'd wake up and I'd be real sore and I just thought it was part of becoming old so (inaudible) really didn't mess with it because I wasn't doing anything as far as you know lifting till I went back to Central.²

¹ P.H. Trans., Resp. Ex. D at 7.

² *Id.*, Resp. Ex. D at 12.

But on October 4, 2004, claimant testified in a deposition that he did not have any back pain after May 2001 and that he was free of back pain when he returned to work for respondent in March 2004.³ Moreover, claimant testified he first began having back pain in April 2004 after stepping off the porch at his home. Claimant testified, in part:

Q. (Mr. Liby) I asked you when the back pain started, you said April of 2004, and I asked what happened.

A. (Claimant) Well, I was at home and was on my way to work.

Q. And what?

A. And I was getting ready to get into my vehicle to leave, stepped off the porch, felt a pinch in my back.⁴

At his deposition, claimant testified he sought medical treatment a couple of days after the porch incident.⁵ Claimant also testified that the day before he sought medical treatment he tripped over a box at work,⁶ which he had failed to mention in the accident report he prepared on August 4, 2004. Claimant further testified his back symptoms remained the same “for the most part” from May 28, 2004, when his doctor’s physician assistant restricted claimant to light duty.⁷

But later during the deposition, claimant’s response to a leading question from his attorney indicated that claimant’s back complaints began in April 2004 and steadily worsened until August 2004.

Q. (Mr. Pyle) And when you came in and talked to me you indicated that your back had started getting worse beginning sometime in April of 2004 and it steadily got worse up until August of 2004; is that your understanding?

A. (Claimant) Yes.⁸

³ Eddy Depo. at 19-30, 66.

⁴ *Id.* at 30.

⁵ *Id.* at 31.

⁶ *Id.* at 41.

⁷ *Id.* at 50-51.

⁸ *Id.* at 65.

The medical records claimant introduced at the preliminary hearing include the 2004 office notes from his personal physician, Dr. Richard A. Ferree. Those notes indicate claimant visited the doctor's office on May 28, 2004, complaining of left lower back and left hip pain for one week from an incident at home:

Left lower back and hip pain for the past week. Reports sprained it at home and then after that actually tripped over some boxes which seemed to aggravate the condition.⁹

But at his attorney's request, claimant saw Dr. Paul S. Stein on October 15, 2004. The history taken by Dr. Stein was somewhat different than those mentioned above. According to Dr. Stein's report, claimant first experienced back symptoms around April 2004 without any specific incident and later stepped off a porch, which caused acute pain and numbness in his left leg. The doctor wrote, in pertinent part:

Employment at Central Plastics began in March of 2004. Work activity involved loading big parts in boxes and putting them on racks . Many of these were up to 20 feet long and were awkward to handle. Some weighed up to 110 pounds. He was glad to get help for the very heavy parts. Sometimes these objects had to be carried on his shoulder and, if they started to slip, he would have to catch them, causing strain on the lower back. Symptoms were first noted around April, without specific injury or accident. He noted the onset of lower back pain which persisted for about two weeks. Then one day on his way to work, he stepped off of the porch and had acute pain and numbness in the left leg. He went on to work. The pain subsequently became progressively worse. . . .

. . . .

Mr. Eddy has a herniated disc in the lower back which is responsible for his back and left leg symptomatology. The history as presented by the patient indicates onset at work in the process of heavy physical activity and an abrupt increase when stepping off of his porch at home. He did not have any specific trauma on the porch, did not fall or twist. It is likely that the lumbosacral disk was injured at work and that the annulus finally gave way, allowing the herniation to occur, while he was stepping off of his porch. . . .¹⁰

Contrary to what claimant told Ms. Thomssen on August 5, 2004, at the November 2004 preliminary hearing claimant testified that he had no problems with his back following his April or May 2001 release from medical treatment until returning to work for respondent

⁹ See P.H. Trans., Cl. Ex. 1.

¹⁰ *Id.*

in March 2004.¹¹ Claimant testified his present back symptoms began in June 2004 or “maybe a little bit before that.”¹² Moreover, claimant was asked about the history in Dr. Ferree’s May 28, 2004 office notes, quoted above, and claimant stated he could not recall providing that history, which indicated his problems began with a strain at home followed by a trip at work.

Contrary to the history in Dr. Ferree’s office notes, contrary to his testimony at his October 2004 deposition, and inconsistent with the history provided Dr. Stein, claimant testified at the preliminary hearing that his present back problems began with a specific tripping incident at work on May 27, 2004. Claimant testified, in part:

Q. (Mr. Pyle) Your medical records indicate that you started having problems with your back before that specific incident [the May 27, 2004 tripping incident at work]; would you agree with that?

A. (Claimant) No.

Q. Why not?

A. Because, I mean, when I get up in the morning, my back’s kind of stiff anyway. But other than that, feels normal after I get up and start moving around.¹³

When questioned about the sequence of the porch incident and tripping over the boxes at work, claimant then offered that he had twice tripped over boxes at work with the porch incident falling between the two incidents at work.¹⁴

The Workers Compensation Act generally places the burden of proof on injured workers to establish their right to compensation.¹⁵ And that burden is to establish by a preponderance of the credible evidence that the workers’ position on an issue is more probably true than not when considering the whole record.¹⁶

¹¹ P.H. Trans. at 19.

¹² *Id.* at 24.

¹³ *Id.* at 26-27.

¹⁴ *Id.* at 45.

¹⁵ K.S.A. 44-501(a).

¹⁶ K.S.A. 2003 Supp. 44-508(g).

Claimant's testimony is inconsistent to such degree it is not persuasive. Accordingly, claimant has failed to prove his back injury was caused by an accident at work. The December 21, 2004 Preliminary Hearing Order should be affirmed. The Board adopts the findings and conclusions set forth in the Order, except the finding that claimant knew of the necessity to report his injury due to having a work-related injury in 2001.

The parties are reminded that only those records that have some relevance and significance in deciding an issue need be introduced into the record. And documents having little evidentiary value are not given substance merely because they accompany countless others of the same ilk.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.¹⁷

WHEREFORE, the Board affirms the December 21, 2004 Preliminary Hearing Order entered by Judge Moore.

IT IS SO ORDERED.

Dated this ____ day of March 2005.

BOARD MEMBER

c: E. Thomas Pyle, III, Attorney for Claimant
Richard J. Liby, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹⁷ K.S.A. 44-534a(a)(2).